

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

vs.

EARL WEST, ET AL, APPELLEES

*Appeal from the United States District Court
for the District of Arizona*

APPELLEES' MOTION FOR REHEARING

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Appellees respectfully request and petition this Court for a rehearing of this cause on the following grounds and for the following reasons:

The Court erred in its interpretation of Article VIII of the Tribal Constitution, and particularly in the following clause:

“Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.”

The Court, in limiting the application of the foregoing clause to dwelling places and improvements, ignored the words, “right of occupancy of long established allocations.” The Court ignored the testimony of Agent Donner (A R 121) who testified that Article VIII was adopted particularly to apply to those on the reservation in a situation similar to that of the Amos and West families.

The Court ignored the interpretation placed upon the Article by the Department of Interior, as evidenced in a letter of Assistant Secretary of the Interior (A R 98).

The Court erred in giving force and effect to that part of Ordinance No. 22, which attempted to interpret Article VIII of the Constitution so as to exclude from the right of occupancy exclusive grazing privileges "or rights not otherwise provided by this Ordinance."

The Court erred in not recognizing the rights of appellees which they acquired long before the adoption of Article VIII or Ordinance 22, and at a time when any member of a tribe could have acquired the right to range his cattle on a designated area of the reservation.

That part of Article VIII, above quoted, was not meant to indicate the remedy by which these appellees, or anyone in their situation, were to be reimbursed for improvements. The word "confirmed" refers to the rights and not to the remedy. Even if we were to concede that Article VIII was meant only to provide a remedy for those who placed improvements upon reservation lands, Ordinance 22 attempts to enlarge upon and qualify the provisions of the Constitution by saying that in giving consideration to such claims, the Council shall have the right to take into account the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use-value of the Tribal land during

NOTE: Numbers following the letters A R refer to pages of the Abstract of Record.

tenure by the claimant. If the Tribal Council can, by an ordinance, interpret the provisions of the Constitution so as to practically emancipate it, then the Constitution has no force or effect as such. It seems clearly apparent that Ordinance 22 was a deliberate attempt to destroy the effect of Article VIII and to deprive appellees of their rights under that article for an adequate reimbursement for their extensive improvements. There is not one item in the Constitution, or in the history of its adoption, which would indicate that such was the intention of those who drafted it.

The Court, in its opinion, refers to the "permission gratuitously granted by the Superintendent." The action by the Superintendent was not a gratuity. All the Superintendent did was to recognize rights that had existed for some time and that had been acquired prior to the granting of control of the range to the Tribe. In that respect the situation is distinguishable from those arising under the Taylor Grazing Act and we humbly submit that the cases interpreting or applying that Act are not applicable.

Article VIII of the Tribal Constitution distinguishes the two situations. When the Tribe was given the right of self-government and control of the reservation land it acquired the right and authority to do what it did by adopting Article VIII and the Tribe is now bound by its Constitution and any attempt to amend, construe or vary its terms by ordinances is unconstitutional.

The amount of land which is being used by appellees should not enter into a determination of their rights. This Court has no knowledge or information upon

which to base a comparison of the land involved with the rest of the reservation. The appellees' rights are based upon Article VIII. If the Tribe had the right and power to adopt the Constitution, and there can be no question on that point, then the Tribe had the right to recognize appellees' rights which they did in Article VIII.

The appellees, relying upon their rights, as recognized by Article VIII, invested large sums of money in improvements. We cannot conceive that the Tribe has the right to destroy all this by merely saying, "You are now trespassers."

It was never contemplated by the terms of Article VIII that those in the position the appellees are in should be required to pay for the use of the land. Such a contention is so obviously unfair that it could not have been the purpose of those responsible for Article VIII; and this Court should not give its approval to that part of Ordinance 22 which is clearly unconstitutional.

Whatever the right the Tribe, or the Government, has to put the appellees off the land they are now using, there must be a more orderly and equitable way to establish those rights than by trespass action and a summary seizing of all the cattle belonging to appellees. Without Ordinance 22 there would be no trespass and if Ordinance 22 is unconstitutional, as we contend, then there can be no trespassing.

We, therefore, respectfully submit that the judgment of the District Court should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that in his judgment the foregoing Motion for Rehearing is well founded and meritorious and that it is not interposed for delay.

FRANK E. FLYNN

Attorneys for Appellees

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APPLICATION FOR STAY OF ISSUANCE OF MANDATE

In the event this Motion for Rehearing should be denied it is the purpose and desire of Appellees to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari and for that reason application is hereby formally made for a stay of the issuance of mandate by this Honorable Court, pending the presentation and determination of such Petition for Writ of Certiorari.

FRANK E. FLYNN

Attorney for Appellees